STATE OF MICHIGAN

COURT OF APPEALS

DENNIS GUSMANO, Plaintiff-Appellee,	UNPUBLISHED January 14, 2014
v KATHLEEN GUSMANO a/k/a KATHY ANN GUSMANO, Defendant-Appellant.	No. 310954 Wayne Circuit Court Family Division LC No. 08-123682-DM

DENNIS GUSMANO, Plaintiff-Appellee,	
v KATHLEEN GUSMANO, Defendant-Appellant.	No. 315908 Wayne Circuit Court Family Division LC No. 08-123682-DM

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

In Docket No. 310954, defendant appeals as of right the June 4, 2012 orders of the trial court following remand[1] from this Court, affirming the earlier denial of defendant's request for attorney fees. Defendant also appeals the trial court's denial of her objections to, and adoption of, the Friend of the Court (FOC) recommendation regarding the award of child support. In Docket No. 315908, defendant appeals as of right the trial court's opinion of April 5, 2013,

[1] *Gusmano v Gusmano (Gusmano I)*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2011 (Docket No. 297211).

finding proper cause and a change in circumstances for a change of custody following remand[2] from this Court. We affirm.

For her first contention of error, defendant challenges the trial court's award and calculation of support.

"Michigan generally follows the 'raise or waive' rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court." *Admire v Auto-Owners Ins Co*, 494 Mich 10, 35 n 52; 831 NW2d 849 (2013) (citations omitted). "A general rule of trial practice is that failure to timely raise an issue waives review of that issue on appeal." *Id.* (citation omitted).

While not found in the trial court record, the lower court docketing sheet indicates defendant filed objections to the Friend of the Court's recommendation following recalculation of support and asserted she did not receive adequate notice of the hearing. The trial court addressed defendant's alleged lack of notice of the hearing on June 4, 2012. Therefore, the issue is sufficiently preserved for appellate review.

Noticeably absent from this Court's opinion remanding the issue of support to the trial court is any reference or allegation by defendant pertaining to the need to impute income to plaintiff. *Gusmano v Gusmano (Gusmano I)*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2011 (Docket No. 297211). At the hearing on January 9, 2012, defendant challenged the calculation of support disputing plaintiff's contention he was unemployed in 2010 and asserting he worked at a store owned by his girlfriend but did not report income. Defendant asserted knowledge that plaintiff "was working a cash job," but came forward with no evidence of such. At the hearing on June 4, 2012, following objections to the Friend of the Court recalculation of support, defendant only challenged the Friend of the Court's inclusion of the child's receipt of federal social security disability (SSD) income in its child support calculation. For the first time, on appeal, defendant specifically contends error in failing to impute income to plaintiff in the calculation of support (without specification if she is referencing child support, spousal support, or both). As such, the issue is not preserved for appellate review.

Defendant also now challenges the trial court's limitation of spousal support to three years. The March 5, 2010 judgment of divorce included a provision requiring plaintiff to pay $400 a month in spousal support to defendant, commencing January 1, 2010, for a period of 36 months. Although on appeal to this Court in Docket No. 297211 defendant alleged error by the trial court in "awarding grossly inadequate spousal support," there is no indication that defendant challenged either the failure to impute income to plaintiff in the calculation of support or the duration of the support. This Court indicated the inadequacy of the lower court record premised on the trial court's failure "to make the requisite findings of fact regarding the factors relevant to its determination of spousal support," and the need to specify on remand whether the award

[2] *Gusmano v Gusmano (Gusmano II)*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2012 (Docket No. 307807).

constituted alimony in gross or periodic alimony. *Gusmano I*, unpub op at 6. Further, defendant did not appeal or object to the trial court's April 5, 2013 order addressing the end date for spousal support or its findings on the spousal support factors. As such, the issue is not properly preserved for appellate review.

As discussed by this Court in *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011) (citations and quotation marks omitted):

> In determining the appropriate amount of child support, a trial court must presumptively follow the Michigan Child Support Formula (MCSF). We review a trial court's finding of facts underlying an award of child support for clear error. A finding is clearly erroneous if this Court, on all the evidence, is left with a definite and firm conviction that a mistake was made. . . . Finally, we review a trial court's discretionary rulings, such as the decision to impute income to a party, for an abuse of discretion. An abuse of discretion occurs when a court selects an outcome that is not within the range of reasonable and principled outcomes.

"[W]hether the trial court properly applied the MCSF presents a question of law that we review de novo." *Clarke v Clarke*, 297 Mich App 172, 179; 823 NW2d 318 (2012).

Similarly, this Court reviews a trial court's findings of fact regarding an award of spousal support for clear error. *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003). "If the trial court's findings are not clearly erroneous, [we] must then decide whether the dispositional ruling was fair and equitable in light of the facts. The trial court's decision regarding spousal support must be affirmed unless we are firmly convinced that it was inequitable." *Id*. at 433 (citations omitted). The decision to award or deny spousal support is reviewed for an abuse of discretion. *Id*. at 432. As noted, the decision to impute income to a party is reviewed for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 25-26; 826 NW2d 152 (2012).

Whether a party has been afforded due process comprises a legal question that is reviewed de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005). Similarly, whether the notice provided is deemed to be sufficient to meet the requirements of due process is a legal question that is reviewed de novo. *Vicencio v Ramirez*, 211 Mich App 501, 503; 536 NW2d 280 (1995). Plaintiff also challenges throughout her appeal whether the trial court followed the instructions of this Court on remand. "Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources (After Remand)*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

Initially, defendant contends that she was deprived of due process by not receiving notice of the scheduled Friend of the Court hearing to recalculate support. Yet, contrary to her assertion, defendant acknowledges that her former attorney, Jorin Rubin, received notice and forwarded it to defendant before the hearing. Defendant acknowledged being aware of the hearing at least three to four days before it occurred, but asserts she could not attend because of her involvement and injury in an accident that occurred at an unspecified time before the hearing. Defendant does not suggest, having received the notice, that she contacted her current counsel, the Friend of the Court, opposing counsel, plaintiff, or the trial court to request an adjournment

of the hearing or to indicate that she was incapable of attending or did anything in response to the notice other than to file a general objection after the recommendation was issued. We note that although defendant claims to have not received notice of the Friend of the Court hearing, she did apparently receive the recommendation that ensued in a sufficiently timely manner to file objections. Defendant fails to cite to any law in her appellate brief in support of her contention that she was denied due process. As such, this Court could conclude that defendant's failure "to adequately brief [her] position, or support [her] claim with authority" constitutes abandonment of the issue. *Moses, Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 417; 716 NW2d 278 (2006).

As recognized by this Court:

> The federal and Michigan constitutions guarantee that persons may not be deprived of life, liberty, or property without due process of law. US Const, Am V; Const 1963, art 1, § 17. Due process is defined similarly in both constitutions and specifically enforces rights enumerated in the Bill of Rights, along with providing for substantive and procedural due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). "Procedural due process limits actions by the government and requires it to institute safeguards in proceedings that affect those rights protected by due process, such as life, liberty, or property." *Id*. at 382 (citations omitted). [*Hanlon v Civil Service Comm*, 253 Mich App 710, 722-723; 660 NW2d 74 (2002).]

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Id*. at 723, quoting *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Id*.

It is undisputed that defendant was in attendance when the matter of support recalculation was initially addressed and the trial court indicated the matter was being referred to the Friend of the Court. Given the litigious nature of these parties and their attentiveness to the details of each other's behavior and the proceedings, bordering on the obsessive, it is difficult to believe that defendant did not monitor the progress of the referral, particularly because it was her appeal to this Court and subsequent remand that precipitated these events. Importantly, defendant does not deny knowing the date of the hearing in advance, having acknowledged receiving notice from her prior counsel. Rather she contends that her lack of direct or personal receipt of notice and her accident precluded her participation. Such an assertion is without merit. Defendant was aware of the hearing, its date, and purpose; she merely elected to do nothing and await the outcome. Further, defendant subsequently filed objections[3] and was afforded an opportunity to

[3] Defendant's objections to the Friend of the Court recommendation were summarized by the trial court as follows: "On April 10, 2012 Defendant filed objections to that recommendation. On June 4, 2012 Defendant's Objections to the Referee Recommendation, which constituted a one sentence objection failing to state any specifics, was DENIED."

be heard. When asked by the trial court to elucidate on her objections and explain how her presence would have impacted the figures used for calculation of support, defendant responded by only suggesting the recommendation did not comport with this Court's prior decision regarding the treatment of social security disability benefits. Defendant never suggested that a failure to impute income to plaintiff or that the income information provided to the Friend of the Court was inaccurate. Because defendant acknowledges she had notice of the hearing, albeit indirect, and was afforded an opportunity to be heard following her objections to the Friend of the Court recommendation, the requirements of due process were met. *Traxler*, 227 Mich App at 288. Defendant's claim that she was denied due process is without merit.

Defendant also asserts the trial court erred in failing to impute income to plaintiff in the calculation of spousal and child support.

"[A] trial court must presumptively follow the Michigan Child Support Formula (MCSF)." *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). As explained by this Court in *Carlson*, 293 Mich App at 205-206:

> According to the [MCSF] the first step in determining a child-support award is to ascertain each parent's net income by considering all sources of income. This calculation not only includes a party's actual income, but it can include imputed income. In other words, a party can be treated as having income or resources that the individual does not actually have. A trial court has the discretion to impute income when a parent voluntarily reduces or eliminates income or when it finds that the parent has a voluntarily unexercised ability to earn. However, a court's decision to impute income must be supported by adequate fact-finding that the parent has an actual ability and likelihood of earning the imputed income. [Citations and quotation marks omitted.]

The MCSF provides a non-exclusive list of factors that a court may consider in deciding whether to impute income, including:

> (1) prior employment experience and history, (2) education level and special skills or training, (3) physical and mental disabilities, (4) availability for work, (5) availability of employment and prevailing wage rates in the local area, (6) the presence of the parties' children in the person's home and its impact on earnings, (7) personal history, (8) whether there is any evidence that the person is able to earn the imputed income, and (9) whether there is evidence of a significant reduction in income compared to the period that preceded the filing of the divorce action. [2008 MCSF 2.01(G)(2).]

A party who challenges the amount of imputed income must demonstrate that the person to whom income is to be imputed has "an actual ability and likelihood of earning the imputed income." *Berger v Berger*, 277 Mich App 700, 725-726; 747 NW2d 336 (2008). According to our Supreme Court, "any imputation of income [must be] based on an actual ability and likelihood of earning the imputed income." *Ghidotti v Barber*, 459 Mich 189, 199; 586 NW2d 883 (1998); 2008 MCSF 2.01(G)(2)(h). Other than defendant's allegation that plaintiff had voluntarily reduced his income, defendant has not demonstrated, for the period at issue, that

plaintiff had the ability and potential to earn at his previous income level. *Berger*, 277 Mich App at 726.

In a somewhat convoluted argument, defendant asserts that her failure to receive notice of the Friend of the Court hearing precluded her from arguing the necessity of imputing income to plaintiff. This is disingenuous given defendant's knowledge of the hearing and the fact that defendant did not assert error in the trial court premised on the failure to impute income following the reissuance of a recommendation from the Friend of the Court or in her objections to that recommendation. Despite an opportunity to allege the necessity of income imputation when queried regarding her objections to the recalculation of support by the Friend of the Court, defendant's only expressed concern was the method used to account for the child's receipt of social security disability income in the determination of support.[4]

Based on the lower court record, we find that defendant is seeking to improperly bootstrap the issue of imputation, which is not preserved, to her earlier appeal regarding the treatment of the child's receipt of social security income in the calculation of child support. As indicated in a recent order of the trial court, defendant's only objections regarding spousal support were summarized as follows:

> Prior to entry of the J[udgment] O[f] D[ivorce], on February 12, 2010 Defendant objected to the proposed Judgment submitted by the Plaintiff. In regards [sic] to spousal support, Defendant's only objection read as follows: "Spousal support should be a separate provision on the Judgment and should be paid through MiSDU." There was never a motion filed as to spousal support being grossly inadequate, or the fact that the court did not specify whether the award was in gross or periodic. In fact, neither party objected to the language in the spousal support provision that taxed the Defendant, or to the specific amount of $14,400 constituting total payment for support.

Defendant had ample opportunity to raise and address her contention regarding the propriety of imputing income to plaintiff in the trial court. Her failure to do so, even when provided a direct opportunity when queried by the trial court, indicates that she is seeking to harbor the alleged error as an appellate parachute. See *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 96-97; 693 NW2d 170 (2005); *LME v ARS*, 261 Mich App 273, 285; 680 NW2d 902 (2004). Reversal cannot be premised on an "error to which the aggrieved party contributed by plan or negligence." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 184; 475 NW2d 854 (1991).

Defendant's implication of error regarding the assignment of her spousal support to pay the outstanding fees of the guardian ad litem (GAL) is precluded premised on this Court's earlier ruling. As found in *Gusmano v Gusmano (Gusmano II)*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 2012 (Docket No. 307807), unpub op at 3, defendant

[4] In referring this matter back to the Friend of the Court, the trial court told defendant, "Your attorney's arguing that his income should be imputed. That's fine. You can argue that over at Friend of the Court if that's what you want to do."

"willingly went along with the arrangement to pay for the GAL." Further, this Court has also ruled on defendant's contention that she should not be required to pay the fees incurred for the services of the GAL out of her spousal support, finding defendant's admission in the lower court that she "*could* afford to pay the GAL fees" precluded her later assertion that application of her spousal support to payment of the fees interfered with her ability to support herself. *Id*., unpub op at 4 (emphasis in original).

Defendant also challenges the trial court's ruling alleging that the court's decision on certain spousal support factors was against the great weight of the evidence and that the limitation of spousal support to three years constituted error. Defendant specifically alleges error with the trial court's evaluations and findings on the following spousal support factors: (a) length of marriage, (b) ability of the parties to work, (c) ability of the parties to pay spousal support, (d) needs of the parties, and (e) effect of cohabitation on a party's financial status.

"The main objective of alimony is to balance the incomes and needs of the parties in a way that will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case." *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003).

> Among the factors that should be considered are: (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id*.]

On remand, the trial court specifically addressed all of the spousal support factors. Defendant appeals the trial court's findings on five of the cited factors even though the trial court favored her on four of the factors and indicated that the effect of cohabitation was neutral. Defendant contends that she should have been substantially favored on all of the significant factors. In doing so, defendant ignores this Court's admonition that a "trial court must consider all the relevant factors and not assign disproportionate weight to any one circumstance." *Berger*, 277 Mich App at 721.

Specifically, the trial court correctly acknowledged the 10 year length of the marriage of the parties, indicating "support for at least 3 years was possibly warranted" and within the time frame suggested by the Friend of the Court prognosticator for spousal support in this case. In reviewing the ability of the parties to engage in employment, the trial court acknowledged defendant's receipt of social security disability and her medical conditions and the type of work historically engaged in by the parties, noting plaintiff was a "certified mechanic" and defendant "is an attorney." The trial court further opined, premised on its ample opportunity to observe the parties, "that perhaps as an attorney [defendant] could consider doing wills or trusts out of her home." Despite the implication that defendant could, possibly, supplement her stream of income, the trial court indicated it "slightly favors" defendant on this factor. Addressing the

parties' ability to pay support, the trial court discussed plaintiff's income level at the time of divorce and defendant's inability to pay support due to her receipt of social security. The trial court also noted that plaintiff's ability to pay spousal support was "weak" given his concomitant obligation to pay child support in accordance with the guidelines. Defendant was still favored on this factor by the trial court. In evaluating the needs of the parties, the trial court "slightly" favored defendant, noting, "neither party was in a high income bracket[.]" The trial court determined that neither party was favored with regard to the effect of cohabitation.

On remand, this Court instructed the trial court to "clarify whether it is awarding alimony in gross or periodic alimony." *Gusmano I*, unpub op at 6. Two forms of spousal support are recognized: periodic alimony and alimony in gross. *Staple v Staple*, 241 Mich App 562, 566; 616 NW2d 219 (2000). In general, one of the distinctions between the two types of support is the modifiability. Periodic alimony can be modified upon a party's petition demonstrating a change in circumstances, MCL 552.28, and has been defined as follows:

> [I]f the installment payments are subject to any contingency, such as death or remarriage of a spouse, courts adhering to the bright-line approach hold that the payments are more in the nature of maintenance payments. . . . [*Staple*, 241 Mich App at 566.]

In contrast, alimony in gross is deemed to be exempt from MCL 552.28 and is, therefore, nonmodifiable. Alimony in gross has been defined as follows:

> If the alimony is either a lump sum or a definite sum to be paid in installments, the alimony provision is classified as alimony in gross. This term is somewhat misleading, because alimony in gross is not really alimony intended for the maintenance of a spouse, but rather is in the nature of a division of property. [*Staple*, 241 Mich App at 566.]

The trial court reviewed on remand its failure to designate the spousal support awarded as being periodic or in gross. Noting that the spousal support guidelines, as run by the Friend of the Court, suggested an award of spousal support to run for three to five years' duration, the trial court elected to award spousal support for a period of three years and designated the support to constitute "periodic alimony." Initially, during the hearing, defendant indicated a preference for an award of alimony in gross, with her counsel indicating, "[M]y client is going to concede the argument and say that it's in gross. After a lengthy discussion out in the hallway with her we're just going to leave it as is." The trial court proceeded to place defendant under oath and to explain the differences in the types of spousal support, affording defendant additional time to consult with her counsel. At that point, defendant's counsel indicated, "[O]n behalf of my client we'd very much like it to be periodic and the Friend of the Court is doing the calculations on income and they can plug in whatever numbers they come up with for the three periods that will cover the thirty-six months as the Court has indicated."

Defendant does not specifically challenge the trial court's factual findings in this appeal, other than the suggestion that defendant could potentially engage in some form of minimal employment from home to supplement her income given her educational level and the trial court's observations. Defendant contends this is erroneous based on the determination by the

Social Security Administration that she is disabled. Yet, there is nothing in the trial court's factual findings that is clearly erroneous. The parties were married for 10 years. The trial court recognized and identified defendant's disability, the parties' respective work histories and incomes. Other than to suggest that by the time of entry of the judgment of divorce that plaintiff was cohabiting with his girlfriend and, thus, had financial assistance available to him in the payment of his monthly expenses she indicates no error in the trial court's factual findings. Notably, defendant fails to argue specifics regarding how her financial needs are not being met, but rather argues the discrepancy in income between the parties and alleges plaintiff's reduced income constituted an attempt to avoid his obligations.

A review of this case reveals a consistent pattern of behavior. The trial court makes a ruling and defendant objects or appeals. The matter is re-addressed by the trial court and defendant then objects on a different ground that was not initially raised, or altering her position entirely, resulting in multiple appeals and the prolongation of the proceedings. In this appeal, with regard to the award of spousal support, defendant objected alleging the trial court's findings were against the great weight of the evidence. Defendant cites no law or legal authority in support of her claim that the trial court's findings were against the great weight of the evidence. "[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Regardless, such a claim is without merit, as the trial court found the factors favored defendant. Defendant did not specifically assert that the award of spousal support was inequitable. Defendant had several opportunities since the entry of the judgment of divorce on March 5, 2010, to appeal the determination regarding support on the basis of inequity, but failed to do so. In addition, we note that since the trial court has clarified that the award of spousal support was in the nature of periodic alimony, defendant's various contentions would have more appropriately been addressed in the trial court as a motion for modification of support and not an appeal to this Court. In that forum, defendant could have argued that plaintiff's financial circumstances have changed since entry of the judgment, necessitating a modification of the support order.

Next, defendant asserts error by the trial court in the denial of her request for attorney fees.

A trial court's decision to award or deny attorney fees in a divorce action is reviewed for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 369; 792 NW2d 63 (2010). The findings of fact underlying the trial court's decision are reviewed for clear error. *Id*.

Defendant asserts the trial court erred in denying her request for attorney fees. She contends that it was established through her disability with Social Security that she was unable to afford the costs of litigation. She takes issue with the trial court's determination, on remand, that the attorney fees she incurred were predominantly the result of her own litigious conduct and argues that her failure to submit billings evidencing the fees incurred at the time of her request was irrelevant, given her later provision of documentation.

"Under the 'American rule,' attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract."

Reed, 265 Mich App at 164. "In domestic relations cases, attorney fees are authorized by both statute, MCL 552.13, and court rule, MCR 3.206(C)." *Id*. As discussed by this Court in *Edge v Edge*, 299 Mich App 121, 136; 829 NW2d 276 (2012):

> MCR 3.206(C)(1) provides that, in a domestic-relations action, "[a] party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding." A party who requests attorney fees and expenses under MCR 3.206(C) must allege facts sufficient to show that either (1) he or she is unable to bear the expense of the action and that the other party is able to pay or (2) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order despite being able to comply. MCR 3.206(C)(2)(a) and (b).

"Nevertheless, attorney fees are not recoverable as of right in divorce actions. Either by statute or court rule, attorney fees in a divorce action may be awarded only when a party needs financial assistance to prosecute or defend the suit." *Reed*, 265 Mich App at 164 (citations omitted). "A party seeking attorney fees must establish both financial need and the ability of the other party to pay." *Ewald v Ewald*, 292 Mich App 706, 724; 810 NW2d 396 (2011). There exists a "common-law exception to the American rule 'that an award of legal fees is authorized where the party requesting payment of the fees has been forced to incur them as a result of the other party's unreasonable conduct in the course of the litigation.'" *Reed*, 265 Mich App at 164-165 (citation omitted). In accordance with this exception, "the attorney fees awarded must have been incurred because of misconduct." *Id*. at 165. The party seeking payment of the attorney fees must also prove "the amount of the claimed fees and their reasonableness." *Ewald*, 292 Mich App at 725. A trial court is required to conduct a hearing or find facts regarding the reasonableness of the fees incurred. *Reed*, 265 Mich App at 165.

At the outset, this Court has indicated that defendant is precluded from asserting that she is entitled to an award of attorney fees premised on the misconduct of plaintiff and his attorney. Specifically this Court stated, "defendant has submitted no evidence regarding what fees were incurred because of plaintiff and his attorney's alleged misconduct. Therefore, the trial court on remand should not consider the alleged misconduct as a basis to award attorney fees." *Gusmano I*, unpub op at 7 n 2.

There appears to be no dispute that the trial court recognized defendant's limited income and financial need. However, at the time of defendant's request for plaintiff's contribution to her attorney fees, she had failed to demonstrate plaintiff's ability to pay. At the time of these proceedings, plaintiff's income was reduced and not substantially different from that of defendant and when his income was higher, plaintiff was also obligated to pay both child support and spousal support. In both situations plaintiff's income and ability to contribute to defendant's attorney fees were compromised. Defendant misconstrues the proof required for attorney fees

indicating on appeal it was only necessary to demonstrate her financial need.[5] Thus, defendant did not fulfill the requirement of MCR 3.206(C)(2)(a).

As noted by the trial court, defendant did not initially submit any accountings from her counsel to substantiate the amount of fees claimed or their reasonableness. A copy of the accountings is not within the lower court record, and the billings attached by defendant comprise an improper expansion of the record on appeal. MCR 7.210(A)(1). The trial court further explained that its refusal to award attorney fees to defendant was premised on her actions in protracting the litigation, her "obstructionist" behavior, and her insistence on coming to court on matters "that any rational person would realize are things that shouldn't be brought to court and could be handled outside of court." On appeal, defendant claims that the trial court's factual findings pertaining to her alleged misconduct were contrary to the great weight of the evidence and requests this Court to consider her alleged misconduct. However, as noted, this Court previously indicated that defendant's allegations of plaintiff's misconduct regarding the incurrence of attorney fees were not supported by any evidence submitted by defendant and that misconduct by plaintiff's counsel was not alleged "as a basis for her attorney fee request." *Gusmano I*, unpub op at 7 n 2. As such, this Court is precluded from now considering, as defendant requests, any alleged misconduct by plaintiff's counsel as a basis for an award of attorney fees.

Defendant has failed to demonstrate that the trial court's determination that her own misconduct resulted in the incurrence of her exorbitant attorney fees was in error. It is only logical that if a party's unreasonable conduct could require them to compensate a party by paying fees incurred as the result of that conduct, the reverse must be true that a party is responsible for the attorney fees they incurred based on their own misconduct. See *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007); *Reed*, 265 Mich App at 164-165. The trial court had an opportunity to observe the litigants and to participate in these proceedings. Based on its observations, the trial court determined that much of the litigation and subsequent costs incurred were attributable to defendant's contrary position on issues, the frequent necessity of court hearings for issues that should have been resolved outside the courtroom, and defendant's engaging in behavior that resulted in delays and the protraction of the litigation. While more specific detail might have been useful to this Court, the trial court did explain its rationale for denying defendant's request for attorney fees. See *Reed*, 265 Mich App at 165. It is noteworthy that defendant does not actually dispute this finding but, rather, asserts that plaintiff was equally responsible for misconduct in the lower court contributing to the heightened fees incurred. Based, however, on this Court's earlier ruling, allegations of plaintiff's misconduct were not to be considered or addressed as a basis for a fee award. Consequently, defendant has failed to demonstrate error by the trial court in denying her request for attorney fees.

[5] "Instead, all MCR 3.206 requires is that the party making the request state facts sufficient to demonstrate to the court that either the requesting party is unable to pay or that the opposing party violated court orders."

Defendant also challenges the trial court's reaffirmation of its finding that plaintiff established a change of circumstances and its decision on the best interest factors, resulting in a change of custody to plaintiff.

This Court explained the applicable standard of review in child custody proceedings in *Dailey*, 291 Mich App at 664-665, stating:

> MCL 722.28 provides that in child-custody disputes, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." Our Supreme Court has explained that MCL 722.28 "distinguishes among three types of findings and assigns standards of review to each." *Fletcher v Fletcher*, 447 Mich 871, 877; 526 NW2d 889 (1994). Findings of fact, such as the trial court's findings on the statutory best-interest factors, are reviewed under the "great weight of the evidence" standard. *Id.* at 878-879. Discretionary rulings, such as to whom custody is awarded, are reviewed for an abuse of discretion. *Id*. at 879. An abuse of discretion exists when the trial court's decision is "palpably and grossly violative of fact and logic. . . ." *Id*. (citation and quotation marks omitted); see also *Shulick v Richards*, 273 Mich App 320, 325; 729 NW2d 533 (2006). Finally, "clear legal error" occurs when a court incorrectly chooses, interprets, or applies the law. *Fletcher*, 447 Mich at 881.

Defendant challenges the trial court's reaffirmation of its finding that a change of circumstances existed that would warrant a modification of child custody in this matter. In remanding this issue to the trial court, this Court in Docket No. 307807 noted that the issue of the child's absences from school was an existing situation and did not constitute a change of circumstances. This Court, however, further indicated:

> We note that just because some characteristic or circumstance may have been present in some form before the entry of a previous custody order does not necessarily bar the later presence of that same characteristic or circumstance from ever being considered a "change in circumstances." In *Dailey*[], 291 Mich App [at] 666[], this Court held that the "escalat[ion] and expan[sion]" of an already-existing bad circumstance can be sufficient to constitute a "change in circumstance." But here, the trial court did not make a finding that the absences were an escalation of the condition that existed at the time of the previous custody order. Instead, the trial court merely relied on the fact that there were several absences that it attributed to defendant. [*Gusmano II*, unpub op at 2-3.]

Defendant's initial argument suggests that she does not comprehend or misconstrues the role of this Court. Defendant contends that if this Court believed that the school absences comprised an escalation sufficient to comprise a change of circumstances it would have simply affirmed the trial court's decision rather than remanded. "The Court of Appeals role is not to 'find' facts, but rather, to review the trial court's decision without substituting its view of the evidence. . . ." *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34 n 12; 609 NW2d 567 (2000).

The underlying purpose for an award of custody under MCL 722.27 "is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). A parent petitioning to change an existing custody order must, as a threshold matter, demonstrate the existence of a "proper cause or a change of circumstances." *Id*., citing MCL 722.27(1)(c). If the parent is unable to demonstrate the existence of a proper cause or a change of circumstances, "then the court is precluded from holding a child custody hearing. . . ." *Vodvarka v Grasmeyer*, 259 Mich App 499, 508; 675 NW2d 847 (2003). In *Vodvarka*, this Court defined the proof necessary to establish "a change of circumstances." Specifically:

> [T]o establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id*. at 513-514 (emphasis in original).]

In order to establish "proper cause" sufficient to warrant a revisit to the child custody order, "a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court." *Id*. at 512. "The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's wellbeing." *Id*. "When a movant has demonstrated proper cause, the trial court can then engage in a reevaluation of the statutory best interest factors." *Id*.

On remand, the trial court found both the proper cause and a change of circumstances and delineated the reasons for this determination. The trial court found, since the entry of the judgment of divorce awarding joint custody: (a) defendant had denied plaintiff his parenting time on more than one occasion resulting in a finding of contempt and the award of make-up parenting time, (b) defendant's attempts to alienate plaintiff and the child by precluding plaintiff's participation in the child's medical visits and providing the school with inaccurate information to interfere with the school's contact with plaintiff, (c) defendant's contact with Child Protective Services alleging plaintiff's failure to provide the child with medication, (d) defendant's responsibility for the child's numerous absences from school without proof of illness, and (e) evidence of defendant's poor "decision making" through interference with the child's participation in extracurricular activities. Specifically, the trial court found that although defendant had caused the child to be absent from school pre-judgment, her failure to assure his attendance had continued and began "escalating and expanding in September of 2010. . . ."

The record demonstrates a history of disagreement and hostility between the parties, which has encompassed the child's health, the medical care he receives, and his school attendance. Neither party denies that these circumstances existed throughout the proceedings. The difficulty that is presented is in determining whether the trial court's finding that the ongoing nature of these issues and disagreements between the parties has escalated and

significantly affected the child's well-being. In his ex-parte motion to change custody, plaintiff noted a series of absences and tardy arrivals for the minor child at school when in defendant's custody, which increased following plaintiff's absence from the marital home in October 2009. In reviewing the minor child's progress, his fourth grade teacher, Cynthia Canney, noted as follows:

> April 2010 – Challenges: John's independent work skills when completing academic tasks and assignments were weaker this card marking. This may have had something to do with his sporadic absences. By being absent, he missed the consistency of class routines, and expectations. I feel he was more dependent on teacher support for reminders and assistance, and less independent about completing things on his own.
>
> Fourth Marking Period – Identified challenges included: "While I know John's health concerns are valid, the number of absences he has accrued this school year has had a negative impact on his learning. When John is in school regularly, his work and independent skills are strong and consistent. The more he misses school, the more he needs to rely on others to succeed. That was particularly true for content area tests this card marking. He would miss tests, and by the time he returned, there would be another test scheduled. This tended to get overwhelming."

Defendant's behavior was also noted by the Friend of the Court referee to pose a risk to the child's continuing access to his pediatrician. The referee stated:

> That the Defendant has become so obstreperous at the pediatrician's office they were prompted to write a letter dated 10/4/2010 which they threatened to terminate providing services for the child. The letter states "After John left the examination room with his father, Mrs. Gusmano was insulting to my nurse practitioner to the point where she will no longer see John again as long as mom is present at the visit. Several other doctors were in the office the day this happened and likewise refuse to see John ass [sic] long as his mom is present for the visit. They find her disruptive to and demanding of our office staff. In fact, one of my partners suggested dismissing the family from our practice because she is so disruptive."

Based on this documentation, defendant's behavior has progressed to the point where it is no longer merely a source of annoyance between the parties but impactful on the minor child's academic progress and the retention of medical services by providers familiar with his history and needs. As recognized in *Dailey*, "The record demonstrates that the parties' disagreements have escalated and expanded to topics that could have a significant effect on the child's well-being." *Dailey*, 291 Mich App at 666. "Given these facts, it was not against the great weight of the evidence for the circuit court to have determined that either proper cause or a change of circumstances existed to revisit the custody decision." *Id.*

Defendant next challenges the trial court's rulings on the best interest factors of MCL 722.23. On December 1, 2011, the trial court entered an order and opinion pertaining to custody

and parenting time following its determination that a change of circumstances existed warranting a review of the custody award. Having determined that plaintiff has demonstrated a change of circumstances, the trial court found the existence of an established custodial environment for the child with both parents, necessitating a showing by "clear and convincing evidence that the change is in the best interest of the child."

In accordance with MCL 722.23, a trial court is required to consider the following "best interests" factors in a determination of custody:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.
>
> (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
>
> (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
>
> (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
>
> (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

In its evaluation, the trial court determined the parties to be equal or neither party to be favored on factors (a), (e), (f), and (k). The trial court indicated that it did consider an interview with the child, in accordance with a stipulation by the parties, for factor (i) and deemed factor (l) not

relevant. Plaintiff was favored on the remaining factors: (b), (c), (d), (g), (h), and (j). On appeal, defendant specifically challenges the trial court's findings on factors (b), (c), (d), (h), and (j).

Factor (b) examines "[t]he capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any." MCL 722.23(b). In finding in favor of plaintiff on this factor, the trial court noted that both parties indicate attending church with the minor child when he is in their custody. The trial court recognized that defendant "is a religious education instructor, for catechism" and that plaintiff "takes the child to religious education." The deciding factor for the trial court was its observation that defendant's "parenting style can be inappropriate at times," calling into question her ability to provide guidance for the minor child. Specifically, the trial court referenced evidence that defendant would have the child study during his participation in a baseball game, taking him "to the car between innings to study." Defendant challenges the trial court's finding that plaintiff was favored with regard to religious instruction. However, the trial court's explanation does not suggest that it favored either parent on this basis. Rather, it indicated that both parents participated in some manner in the child's religious instruction. Defendant challenges the trial court's concerns regarding her ability to provide guidance premised on her having the child study during his baseball game, implying her decision demonstrated a better prioritization of activities for the minor child. Defendant also asserts she is better at providing guidance for the child because she precluded him from playing a violent videogame, which plaintiff permitted. While the examples provided by defendant demonstrate a difference in parenting styles between the parties, the trial court's emphasis is more directed to plaintiff's engaging the minor child in outside or extracurricular activities. As such, the trial court's findings are supported by the evidence.

The trial court also favored plaintiff on factor (c), which encompasses "[t]he capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." MCL 722.23(c). The trial court reviewed the sources of income for both parties and noted that both parents "have the capacity to provide the child with food and clothing." In favoring plaintiff on this factor, the trial court's focus was on the provision of medical care, noting: "When it comes to medical care [defendant] has displayed a level of over concern or paranoia having accused [p]laintiff of failure to medicate. Defendant has also allowed the child to excessively miss school, and takes the child to the doctor quite excessively. Plaintiff took the child to a new doctor and currently the child is doing better (as far as his asthma is concerned), and is taking less medication than ever before." In contesting this determination, defendant argues that she was only providing medications for the child as prescribed and that her concerns for the child's health were legitimate premised on his diagnoses. She suggests plaintiff jeopardized the child's health by taking him to an alternative physician that is not a specialist. Defendant attributes the child's health improvement to changes in physical or environmental conditions and maturation. Defendant proceeds to challenge allegations by plaintiff pertaining to her own health and medical preoccupation, which is completely irrelevant to this factor and was not referenced or implied by the trial court. Defendant also acknowledged the request by the child's physician for the appointment of a guardian ad litem due to the inability to obtain a consistent and "reliable history" from both parents, who provided conflicting information regarding his "illnesses." Taking into consideration the subsequent issues that arose

between defendant and the staff of the child's pediatrician, it cannot be said that the trial court's determination on this factor was against the great weight of the evidence.

Factor (d) concerns "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity." MCL 722.23(d). The trial court credited both parents with full exercise of their respective parenting times. In favoring plaintiff on this factor, the trial court focused on the improved consistency and stability for the minor child regarding his attendance and performance at school and participation in extracurricular activities following the change to plaintiff having parenting time during the week with the minor child. In challenging this finding, defendant focuses on the contrived custody situation created by the court when it altered the child's primary residence from defendant to plaintiff. Defendant contends there was no demonstration that the home environment she had provided for the child was unsuitable. As noted in *Mogle v Scriver*, 241 Mich App 192, 199; 614 NW2d 696 (2000) (citation omitted), "in making their 'best interests' determination, trial courts must not consider the 'acceptability' of the homes to be established by each parent, but instead must concentrate on the 'permanence' or 'stability' of the family environments offered by the contesting parents." The evidence suggests that since residing with plaintiff the child's school attendance and participation have been more consistent, which renders the trial court's finding on this factor to be in accord with the great weight of the evidence.

Defendant also challenges the trial court's finding that plaintiff was favored on factor (h), which encompasses "[t]he home, school, and community record of the child." MCL 722.23(h). In favoring plaintiff on this issue, the trial court noted:

> According to school records the minor child missed 7 days of school in a 3 week period for the month of September, 2010 (one on Plaintiff's watch, the rest when with the Defendant). Beginning October 2010 through the rest of the 2010-2011 school year, while the Plaintiff had temporary custody, the child missed approximately 5-5 ½ days. There were less days missed in a nine month period while with [plaintiff], than in the month of September alone. Furthermore, the original motion to change custody alleged that from March 2010 through the filing of the motion, the minor child had several absences and excessive tardies.

In contesting this finding, defendant takes issue only with the necessity of the child's absences, not the trial court's determination that the pattern of absences had significantly changed while the minor child was in plaintiff's custody. The trial court's reference to the parties' dispute regarding the legitimacy of the child's absences from school was not the focus of the ruling. Rather, the trial court relied on documented evidence that, while residing with plaintiff, the minor child's attendance and, concomitantly, his participation at school had improved dramatically. This finding is not against the great weight of the evidence.

Finally, defendant contests the trial court's determination on factor (j), which pertains to "[t]he willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." MCL 722.23(j). In favoring plaintiff on this factor, the trial court specified certain instances in which defendant had interfered with plaintiff's relationship and parenting of the minor child, including (a) denial of parenting time, necessitating make-up parenting time, (b)

precluding plaintiff to participate in the child's medical appointments by refusing plaintiff entry into the exam room, (c) defendant's placement of the child into counseling without obtaining concurrence regarding the child's participation and the counselor selected, (d) cancellation of the child's dental appointment because it fell during her parenting time, and (e) defendant's participation in a private session with the school board without notifying plaintiff and her questionable credibility regarding when this meeting was scheduled. Defendant acknowledges having previously requested plaintiff's parenting time be supervised. Defendant contends the facts relied on by the trial court in ruling on this factor are relevant only to legal custody and not physical custody. In disputing the trial court's finding, defendant relies on the parties' respective self-interested statements regarding the willingness to foster a relationship with the other parent rather than on actual behavior. The circumstances cited by the trial court in support of its decision evidence defendant's active interference with plaintiff's parenting of the minor child through excluding him from information and participation in matters that directly impact the minor child. The evidence relied on by the trial court did not clearly preponderate in the opposite direction from the trial court's conclusion on this factor. And, in response to defendant's criticism, we note that the facts relied on by the trial court are also relevant in the determination of legal custody, MCL 722.26a(7)(b), which requires a trial court to consider "[w]hether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." Contrary to defendant's implication, however, there is nothing to indicate that the facts used to determine legal custody under MCL 722.26a(7)(b) and physical custody under MCL 722.23(j) are mutually exclusive or may not overlap.

Finally, defendant contends error regarding the trial court's failure to conduct a new best interests hearing encompassing additional and/or new testimony and evidence since the trial court's last ruling. Defendant confuses remand with relitigation. When a matter or issue is on remand, a trial court is required to limit its ruling to the scope of the remand order. *Waatti & Sons Electric Co v Dehko*, 249 Mich App 641, 646; 644 NW2d 383 (2002). Thus, "when an appellate court gives clear instructions in its remand order, it is improper for a lower court to exceed the scope of the order." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 544; 705 NW2d 365 (2005). However, "[w]hen an appellate court remands a case without instructions, a lower court has the 'same power as if it made the ruling itself.'" *Id*. (citation omitted). In this instance, the Court remanded to the trial court on the issue of establishment of a change in circumstances. It did not remand for a review of the trial court's ruling on the best interest factors. "The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court." *Id*. at 544. The lower court is free "on remand to consider and decide any matters left open by [the appellate] mandate." *Grievance Administrator v Lopatin*, 462 Mich 235, 261; 612 NW2d 120 (2000).

In this instance, the matter that required resolution was the trial court's determination that a change of custody was warranted. "To straitjacket proceedings subsequent to a decision on a case by an appellate court by making assumptions regarding the disposition of arguments which the appellate court did not see fit to consider, is not, in our opinion, the wisest of policies." *Taines v Munson*, 42 Mich App 256, 259-260; 201 NW2d 685 (1972). Commensurately, to expand the scope of the proceedings in the trial court following remand would be, in effect, to address a new issue rather than to resolve the issue originally appealed. Consideration of new or additional evidence would have resulted in an entirely new proceeding. While it should arguably

be discouraged, defendant is not precluded from alleging anew a change in circumstances. However, such an allegation and any evidence in support of it have no place in resolving the issue as it existed on remand. Further, defendant's contention comprises mere speculation that circumstances have changed. The proper procedure would entail a new motion in the trial court and not an attempt to convolute or expand proceedings that have already concluded. Consistent with *Meadowlanes Ltd Dividend Housing Ass'n v City of Holland (After Remand)*, 176 Mich App 536, 542; 440 NW2d 71 (1989), aff'd in part, rev'd in part on other grounds 437 Mich 473 (1991):

> The order remanding this case back to the tribunal did not mandate that the tribunal rehear the case or consider other evidence. It was apparently the decision of the tribunal that enough facts were available to it on the record to comply with the order of remand. We have no reason to disagree with this assessment.

We opine, given the history and litigiousness of the parties, that it is important for some level of finality to be attained in this matter. While this will not preclude the parties from continuing to litigate issues rather than resolve them directly, it may at least permit the focus to be on the current situation and future rather than on repetitive attempts to rework the past.

Finally, defendant asserts that this matter should be assigned to an alternative judge on remand or for future proceedings.

In accordance with MCR 2.003(D)(1), a party is required to file a motion for disqualification within 14 days "of the discovery of the grounds for disqualification." In those situations where a party is aware of a judge's alleged judicial bias and does not seek disqualification, the issue is not preserved for appellate review. *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985). The disqualification of a judge pursuant to MCR 2.003 also requires adherence to the rule that "to preserve for appellate review the issue of a denial of a motion for disqualification of a trial judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." *Welch v Dist Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996); see also MCR 2.003(D)(3)(a). Because the lower court record contains no evidence that defendant ever filed a motion for disqualification of the trial court judge or requested a hearing before the chief judge of the circuit court in which this matter was pending, the issue is not preserved for appellate review.

In accordance with *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012) (citations omitted):

> This Court reviews a trial court's factual findings on a motion to disqualify for an abuse of discretion and reviews de novo the trial court's application of the facts to the law. The trial court abuses its discretion when the trial court's decision falls outside the range of reasonable outcomes. Due process requires that an unbiased and impartial decision-maker hear and decide a case. A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption.

Because the issue is unpreserved, this Court's "review is limited to determining whether a plain error occurred that affected substantial rights." *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000) (citation omitted).

Defendant contends the trial court is biased and that this matter should be reassigned to an alternative judge on remand or for future matters. In support of her contention of bias, defendant references this Court's prior remands to the trial court for correction of errors, but cites to no specific instances of the trial court denigrating defendant or her counsel or evidencing the trial court's failure to be objective.

In general, to establish the existence of judicial bias, a party is required to prove that "a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial." *Van Buren Charter Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). Disqualification does not ensue merely because a trial judge's rulings are against a party, "no matter how erroneous, or vigorously expressed." *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). To merit disqualification, a judge's opinion must demonstrate such "deep-seated favoritism or antagonism" that "fair judgment" is deemed to be "impossible." *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009).

Defendant provides no citation to the lower court record demonstrating support for her contention of judicial bias. Although the trial court expressed frustration for the parties' lack of communication and effort to resolve issues outside of the courtroom and the prolongation of proceedings in this matter, the trial court was even-handed in expressing blame. In terms of defendant's contention that the trial court was disrespectful or denigrating of this Court's remand, the complete opposite is true. Although the trial court expressed some confusion by this Court's opinions on remand, the trial court went to extreme efforts to understand and comply with this Court's rulings and made an effort to clarify its findings on remand.

"[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Mich Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). As noted, "[t]o establish judicial bias," it must be shown "that the trial court display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." *Eldred v Ziny*, 246 Mich App 142, 152; 631 NW2d 748 (2001) (citation and quotation marks omitted). Yet, other than conclusory allegations, defendant has "failed to properly present [her] claim through discussion and citations of the record showing some factual basis for [her] assertions." *Id*. at 153. Because defendant has not properly preserved this issue and has failed to substantiate her assertions through any citation to the record, her assertions of bias are without merit and she is entitled to no relief on this basis.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad